SUPREME COURT, U. S.

FILED

JUL 22 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2059

WILLIAM GEORGE BROGE, EUGENE MOBLEY, FREDDIE WALDEN and JIM TRENT,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

WILLIAM GEORGE BROGE, EUGENE MOBLEY, FREDDIE WALDEN and JIM TRENT,
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STATE OF FLORIDA,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners request issuance of a Writ of Certiorari to the Florida Supreme Court and show in support of this petition as follows:

JURISDICTION

This is a criminal case in which the Petitioners were convicted of felonies. Petitioners appealed to the Fourth District Court of Appeal, State of Florida which affirmed (A1). Petitioners filed a Petition for Certiorari in the Florida Supreme Court which was denied on April 30, 1974 (A4), and a timely petition for rehearing was denied on June 22, 1974 (A5).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FLORIDA COURTS ERRED IN APPLYING A SUFFICIENCY OF THE EVIDENCE TEST TO DETERMINE WHETHER HARMFUL ERROR OCCURRED IN A CRIMINAL CASE INVOLVING THE VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT.

2. WHETHER DEFENDANTS' RIGHT TO BE CONFRONTED WITH WITNESSES AND TO CROSS-EXAMINE THEM WAS VIOLATED WHEN THE STATE PROSECUTOR WAS PERMITTED, IN CLOSING ARGUMENTS, TO COMMENT ON MATTERS OUTSIDE OF THE RECORD INVOLVING THE STATE'S WITNESSES, DEFENSE COUNSEL, AND THE PROSECUTOR'S PERSONAL BELIEF AS TO THE MERITS OF THE CASE.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront the witnesses against him and cross-examine them. The Fourteenth Amendment imposes the Sixth Amendment on the States.

STATEMENT OF THE CASE

Petitioners were convicted of various felony riot charges which arose out of a labor union dispute in Palm Beach County, Florida. Sentences of imprisonment from two to five years were imposed on the Defendants. During the trial and in closing argument the State Prosecutor made the following statements about his witnesses, what

defense counsel has done in other cases, and his personal beliefs, none of which were part of the record. The right of cross-examination of this "testimony" was not given the Defendants.

> "Mr. Starr has come up before you in his argument and indicated to you that it was his duty as a lawyer to protect his clients and proceed in that manner. He has cried here, which he cries in every criminal case.
>
> I am sorry to disappoint you if you thought you were singled out for the honor, but he cries in every criminal case. * * * (A6).
>
> In this and every single case Mr. Starr and I have handled, the police have always lied (A6).
>
> In every case the police have lied. They come into Court and testify from the witness stand and they lie. * * * (A6).
>
> I submit that I cannot understand this accusation against the men that you saw in here, the finest bunch of young men I have seen with the Sheriff's Department since I have been here." * * * (A7).

After discussing in his closing argument the allegation by Defense Counsel that prosecuting witnesses were not telling the truth, the prosecutor stated:

> * * * "I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that." (A8).

Defendants' conviction was appealed to the Fourth District Court of Appeal of the State of Florida which affirmed, writing a decision in which the court made it perfectly clear that the remarks of the prosecutor were improper and should not have occurred. The court ap-

parently found that the erroneous remarks did not constitute harmful error. The court noted in the first paragraph that the Petitioners did not challenge the sufficiency of the evidence on appeal, and went on to quote from *Henderson* v. *State*, 113 So. 689 (Fla. 1927), as follows:

> ". . . we cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would indeed, be a dangerous precedent."

The Court then went on to remind attorneys that these remarks are improper, but affirmed "finding no error requiring reversal * * *".

The Florida Supreme Court denied a Petition for Certiorari without writing an opinion.

REASONS FOR ALLOWANCE OF WRIT

The Sixth Amendment of the United States Constitution clearly guarantees a Defendant in a criminal case the right to be confronted by the witnesses against him which includes the right of cross-examination. States are obliged to follow the same procedure under the Fourteenth Amendment.

> "The sixth amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the fourteenth amendment. The right to be confronted with the wit-

nesses against him includes the right to cross-examine those witnesses. The right of an accused to be confronted with witnesses against him must be determined by the same standards in both Federal and State proceedings." *Pointer* v. *State of Texas*, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965).

In the present case the prosecutor expressed his personal opinion and belief as to the veracity of the testimony of his witnesses, told the jury that defense counsel makes the same argument and uses the same tactics in other cases which they have tried together, and "testified" that police officers testifying on behalf of the State were "the finest bunch of young men I have ever seen with the Sheriff's Department since I have been here".

The prosecutor is of course an officer of the Court and is also a public official. It can be presumed that the jury gave great weight to his "testimony" even though it was unsworn. His statements bore directly on the issue of ultimate guilt or innocence of the Defendants.

The Fourth District Court of Appeal did not discuss all of the remarks which form the basis of this writ, holding the most serious to be the expression of personal belief by the prosecutor in the merits of the case, and finding the error not to be of a reversible nature. A reading of the opinion of the Fourth District Court of Appeal makes it clear that the Court was of the opinion that in light of the evidence and the sufficiency of it no error was shown. This is not the proper criterion for review of criminal cases where a violation of a constitutional right exists in any court. This Court held in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that "before a federal constitutional error can be held harmless" there must be a finding that it was "harmless beyond a reasonable doubt". In the *Chapman*

case the California Supreme Court applied a test on the appeal which found error to be harmless unless it produced a miscarriage of justice. This Court reversed the *Chapman* decision holding that the issue must be whether the error was harmless beyond a reasonable doubt.

In view of the foregoing it is respectfully submitted that the Petition for Certiorari should be granted.

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By LARRY KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that copy of the foregoing has been furnished by mail this 19th day of July, 1974, to the State's Attorneys Office, Palm Beach County Courthouse, West Palm Beach, Florida and the Office of The Attorney General, Pan American Building, West Palm Beach, Florida.

LARRY KLEIN

APPENDIX

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1973

CASE NOS. 72-399, 72-400, 72-401 and 72-402.

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed January 8, 1974.

Appeal from the Circuit Court for
Palm Beach County;
Vaughn J. Rudnick, Judge.

Larry Klein of Cone Wagner Nugent
Johnson & McKeown, West Palm
Beach, for appellants.

Robert L. Shevin, Attorney General,
Tallahassee, and Nelson E. Bailey,
Assistant Attorney General, West
Palm Beach, for appellee.

FERRIS, JOHN G., Associate Judge.

Following a five weeks jury trial, appellants were convicted on various felony riot charges which stemmed from a labor dispute. Appellants do not challenge the

sufficiency of the evidence but complain mainly of improper remarks and statements of the prosecutor. The most serious instance occurred during final argument when the prosecutor said:

> "If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that."

While the quoted comment, even though ambiguous, seems to be relaying the prosecutor's personal belief on the believability of portions of the evidence, it is of course lifted out of context of the entire argument and its relationship to argument of defense counsel. In his closing argument, defense counsel castigated the testimony of the policemen who testified, commenting on the "false testimony" and "bold lies" of these witnesses. He accused the prosecution of "buying" evidence and knowing that the police officers had deliberately lied in this case. In rebutting those comments and others, the prosecutor advised the jury that if they believed those accusations as to the testimony of the police officers they should immediately find the defendants not guilty and then made the comment above quoted.

The Supreme Court was faced with a similar situation in Henderson v. State, Fla. 1927, 113 So. 689, and, after reviewing the alleged improper remarks and the arguments of the defense which preceded them, said:

> ". . . we cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to

deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would indeed, be a dangerous precedent."

We find that the comment complained of was induced by, and was in fair rebuttal to, the repeated personal expressions by defense counsel as to veracity of certain witnesses and to the complicity of the state in offering known perjured testimony. The defendants cannot therefore be heard to complain in these circumstances.

Both prosecution and defense attorneys are reminded that, though a prolonged and hotly contested criminal jury trial will occasionally produce emotional remarks and replies, they are both under a continuing duty to refrain from improper remarks which may well prompt other improper remarks in retaliation. Disciplinary Rule DR 7-106(C)(4) of the Code of Professional Responsibility of the Florida Bar enjoins all trial counsel from asserting:

". . . his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

Finding no error requiring reversal, the judgments of conviction in each case are AFFIRMED.

WALDEN and MAGER, JJ., concur.

SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974

TUESDAY, APRIL 30, 1974

CASE NO. 45,147

DISTRICT COURT OF APPEAL, FOURTH DISTRICT
72-399, 72-400, 72-401, 72-402

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4 5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, ERVIN, BOYD and McCAIN, JJ., concur

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. John B. Dunkle, Clerk
Hon. Vaughn J. Rudnick, Judge
Cone, Wagner, Nugent, Johnson & McKeown
(Hon. Larry Klein)
Office of State Attorney,
West Palm Beach
Hon. George Georgieff
Hon. Basil S. Diamond

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1974

CASE NO. 72-399 & 72-400 & 72-401 & 72-402.

WILLIAM GEORGE BROGE, et al.
Appellant

v.

STATE OF FLORIDA
Appellee

FEBRUARY 8, 1974

ORDERED that Appellants' Petition for Rehearing, filed January 21, 1974, is hereby denied.

cc: Cone Wagner Nugent Johnson & McKeown
State Attorneys Office
Attorney General's Office

* * * it is a two week case.

This case has been delayed and dragged out to an interminable and unconscionable length and was dragged and dragged and dragged out. The State put on thirty-five witnesses on the stand here. Most of the direct examination of these witnesses lasted five, ten, fifteen, twenty, twenty-five minutes at the most and cross examination took hours. Hours.

Mr. Starr has come up before you in his argument and indicated to you that it was his duty as a lawyer to protect his clients and proceed in that manner. He has cried here, which he cries in every criminal case.

I am sorry to disappoint you if you thought you were singled out for the honor, but he cries in every criminal case. Mr. Starr has had a history of root canal work which invariably pops up on the selection of jurors in his inability to speak.

He has diabetes and is not a well man, I will vouch for that, and it is an unhappy circumstance that he has that. He cross examined to the enth degree, but in any case, it is not anything particularly new in this particular case. He will argue the full time requirements he has so you will be set for another hour and a half on final argument.

In this and every single case Mr. Starr and I have handled, the police have always lied.

MR. STARR: We object to this and ask the Reporter to take the argument. It is not a proper comment.

THE COURT: I thought the Reporter is taking the final argument. He indicates he is, Counselor.

MR. STARR: Thank you.

THE COURT: The objection is noted and overruled.

MR. T. BROWN: In every case the police have lied. They come into Court and testify from the witness stand and they lie.

Now the role of an attorney, and quite frankly I am unhappy to be an attorney in this particular case, and I * * * delay is in the interest of a fair trial for his client is not true, because the delay is to convey to the jury, to have them forget the evidence and testimony and to confuse the issue with so many facts that you forget what we are doing here and forget what the evidence in the case is.

We have been delayed now five weeks on a two week trial.

MR. GROSS: I will object to that statement, Your Honor. We have not been delayed, and we will ask the Court to advise counsel for the State to argue the facts and the evidence and limit his argument to that, please, sir.

MR. T. BROWN: Your Honor, I claim my right here of fair play. He mentioned it in his opening statement and I claim my right of fair play.

THE COURT: Objection overruled.

MR. T. BROWN: The delay here must be attributable to one side or the other.

Let me say this: Mr. Starr, it is apparent, believes the police lied. He believes that implicitly. I submit to you when he tells you that, he believes that in his heart that the police lied.

I submit that I cannot understand this accusation against the men that you saw in here, the finest bunch of young men I have seen with the Sheriff's Department since I have been here. I have been with the Solicitor's office for four and a half years and this case was purposely set on June 21st because I am leaving the office and this is the last case I intend to try here. Mr. Mounts has my notice and has had it for some time. I submit that is it for me in the criminal practice as a prosecutor.

I would like you to understand this and I ask your indulgence and I ask you to listen carefully and do what

I ask you to do, if it is in your conscience. Mr. Starr made the accusation against these young men that they came in here and lied against these defendants here on trial. He said they got together and fabricated the evidence.

The worst thing that anyone can do from the witness stand against individuals is to falsely accuse them to see that they are convicted. This is what he said all the way and it is no secret that he accuses the State and myself of suborning perjury. When I sit there as the State's prosecutor and allow them to perjure themselves, that is suborning perjury in this case.

Let me say this: If you believe as you sit right here now that this is what occurred in this particular case, if you believe those police officers came in here and fabricated the stories which they told in regard to this defendants, then please do not consider the evidence in this particular case. When you go back to the jury room after you have been instructed by the Court on the law, do not consider the evidence, do not go any farther, just sign all the not guilty verdicts and return them and go home. Because this is what a jury is for. A jury is for the protection of free men in our society and that is your duty.

If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that.

MR. STARR: We object to the personal belief of the prosecutor and we believe those are grounds for mistrial and we make that motion for mistrial on his personal belief.

THE COURT: The objection is overruled and the motion for mistrial is denied.

Counsel is commenting on the evidence.

MR. T. BROWN: I want to discuss the evidence in this case for the first time. Mr. Starr did not see fit to discuss the evidence. I don't believe you will find from the evidence that that occurred at all.

It seems to me that maybe I better * * *.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2059

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,

Petitioners,

versus

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM GEORGE BROGE, EUGENE MOBLEY, FREDDIE WALDEN and JIM TRENT,

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STATE OF FLORIDA,

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BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, which affirmed Petitioners convictions and sentences on January 8, 1974, is reported at 288 So.2d 280 (4 DCA Fla.1974)(Petitioners' Appendix A1-3). The order of April 30, 1974, denying Petitioner's Petition for Writ of Certiorari in the Supreme Court of Florida is reported at 295 So.2d 302 (Fla.1974)(Petitioners'

Appendix A4).

JURISDICTION

Petitioners, in their jurisdictional statement in the Petition for Writ of Certiorari, make no presentation of any constitutional, statutory, or court rule authorizing their present application for the issuance of the Writ of Certiorari by this Court. As Respondent will more fully develope in the argument portion of this brief, Respondent maintains that Petitioners have not demonstrated any legal authority for this Court's assumption of jurisdiction as is required by Rule 23 of the Rules of the Supreme Court of the United States. Therefore, the present application for Writ of Certiorari is legally insufficient and should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront witnesses against him and cross-examine them. The Fourteenth Amendment of the United States Constitution imposes the Sixth Amendment upon the States.

QUESTIONS PRESENTED (RESTATED)

1. Whether the sufficiency of the evidence of guilt is a factor which an appellate court may consider in determining

whether an alleged improper prosecutor closing argument constitutes reversible error?

2. Whether an alleged improper prosecutor closing argument, per se, constitutes a violation of a defendant's right to confrontation and cross-examination in terms of the Sixth and Fourteenth Amendments of the United States Constitution justifying the assumption of jurisdiction and issuance of the Writ of Certiorari by this Court?

STATEMENT OF THE CASE

Respondent, generally accepts Petitioners' Statement of the Case insofar as it is accurate, nonargumentative, and supported by a correct reference to a portion of the State court record.

Respondent adds the additional factual matter that Petitioners have never raised in any Florida State court the United States Constitutional grounds for attack that Petitioners now present before this Court. Therefore, no Florida State court has ruled on the Constitutional challenges that Petitioners argue in their present application for issuance of a Writ of Certiorari.

ARGUMENT

From a reading of the JURISDICTION, STATEMENT OF THE CASE, and REASONS FOR ALLOWANCE OF WRIT sections of

Petitioners' Petition for Certiorari, it would appear that Petitioners assume that this Court should accept jurisdiction of this case and issue a Writ of Certiorari favorable to Petitioners merely because Petitioners claim they were deprived of their right of confrontation and cross-examination by the prosecutor's closing arguments. Respondent respectfully maintains that Petitioners' contentions are unsound and should be rejected by this Court.

Respondent points out that the issuance of the Writ of Certiorari by this Court is one of discretion. See Rule 19 of the Rules of the Supreme Court of the United States. Rule 23 of the Rules of the Supreme Court of the United States specifically requires a Petitioner to include a jurisdictional statement establishing the basis for this Court's assumption of jurisdiction. Since Petitioners have not done so, Respondent suggests that this Court should decline to assume jurisdiction and issue the discretionary Writ of Certiorari on the grounds that Petitioners have failed to comply with the Rules of this Court.

The specific constitutional challenge made in this Court to the prosecutor's closing argument is based upon a claim of violations of the Sixth Amendment of the United States Constitution right to confrontation and cross-examination. This constitutional basis for attack, as well as Petitioners' claim of an improper standard of review of an alleged violation of a

constitutional right (see Petitioners' and Respondent's respective Question No. 1), has never been raised by Petitioners in the Florida State courts. Therefore, Petitioners are precluded from belatedly raising these new grounds for the first time in this Court. See Missouri Insurance Company v. Gehner, 281 U.S. 318, 50 S.Ct. 326, 74 L.Ed. 870 (1930); Pennsylvania Railroad Company v. Illinois Brick Company, 297 U.S. 447, 56 S.Ct. 556, 80 L.Ed. 796 (1930); Capitol City Dairy Company v. Ohio ex rel. Attorney General, 183 U.S. 238, 22 S.Ct. 120, 46 L.Ed. 171 (1902); and Mercer v. Theriot, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964).

The issuance of a Writ of Certiorari by this Court is an act done only when the case before it clearly presents special and important reasons therefore (Rule 19 of the Rules of the Supreme Court of the United States). Respondent believes Petitioners' case is not one establishing any compelling reasons for this Court's assumption of jurisdiction and the issuance of the Writ of Certiorari. The case involves no new or claimed new principle of law nor any determination by a State court of any federal question.

It is well settled by the decisions of this Court that, in cases involving an alleged state prosecutor's improper closing argument, the burden is upon the Petitioner to clearly demonstrate that the act of the prosecutor constituted a violation of a federal constitutional right justifying Supreme Court intervention.

See Buchalter v. New York, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943). As this Court specifically noted, the due process clause of the Fourteenth Amendment of the United States Constitution does not permit a dissatisfied criminal defendant to bring to the test in the Supreme Court of the United States every ruling made in the course of a trial in a state court. See Buchalter v. New York, supra, at page 430.

Even if this Court were to examine the alleged improper prosecutor closing arguments, what becomes patently clear is that Petitioners have merely presented, on page 3 of their Petition for Writ of Certiorari to this Court, a list of closing arguments that Petitioners dislike. Petitioners make no effort to establish, even a prima facie case, that these particular arguments, in the context of the state trial record, constitute a violation of Petitioners' Sixth and Fourteenth Amendment Constitutional rights.

In Buchalter v. New York, supra, this Court pointed out that an alleged improper prosecutor comment is not per se grounds for issuance of a Writ of Certiorari (319 U.S. at 431). This same position was recently reaffirmed by this Court in the case of Donnelly v. DeChristoforo, ___ U.S. ___, 94 S.Ct.1868, 40 L.Ed.2d 431 (1974). In the Donnelly decision, the Court stated that there is a "distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held . . . . to amount to a denial of constitutional due process."

(___ U.S. ___, 40 L.Ed.2d 439) This Court went on to hold that a petitioner must demonstrate to this Court "that an examination of the entire proceedings in the case" supports his contention that the prosecutor conduct resulted in a denial of due process (___ U.S. ___, 40 L.Ed.2d 437). It is this last quotation from the Donnelly v. De Christoforo case that requires an examination of the quantum of evidence of guilt be had as part of the entire state court proceedings in determining if any alleged prosecutor arguments resulted in prejudice or a denial of due process to a criminal defendant (contrary to Petitioners' Question 1 on page 2 of their Petition).

In the case at bar, if this Court were to examine the particular comments challenged by Petitioners in the context in which they occurred and in the total setting of the trial proceedings, as per this Court's decision in Donnelly v. DeChristoforo, supra, Respondent believes that Petitioners' position would be found to be totally without merit. First, Petitioners never challenged the quantum or quality of the evidence of guilt presented at their trial. Thus, the likelihood of a miscarriage of justice or prejudice to Petitioners as a result of any alleged improper prosecutor closing arguments is minimal. Second, an examination of the particular comments (page 3 of Petitioners' Petition) reveals that each and every comment cited by Petitioners was either proper or in direct response to the antics and arguments previously presented by Petitioners' privately retained trial counsel in his

closing argument. Thus, Petitioners are in no position to complain of the particular closing arguments of the prosecutor. See Buchalter v. New York, supra, at page 431. Third, the record of the state proceeding further reveals that the jury was thoroughly and properly instructed by the trial judge that closing arguments are not to be considered as evidence (see Respondent's Appendix 1). Finally, Respondent points out that the record reflects that the jury, irrespective of Petitioners' claims concerning the results of the challenged prosecutor closing arguments, made careful, deliberate, and specific findings as to each defendant and charge. The jurors painstakingly distinguished and weighed the evidence as to each individual defendant. Some were determined guilty of felonies, some not; some were determined guilty of misdemeanors; some not; and some were determined guilty of no offense (see Respondent's Appendix 2-11). The jury did not "rally to the flag" of any alleged prejudicial remarks that Petitioners claim the prosecutor waved in their face. If the jury had been prejudiced, they would not have made the fine distinction that they did. Therefore, even a casual view of the state court record reveals that Petitioners' conclusions concerning the legal effect of the challenged prosecutor closing argument are unsound.

CONCLUSION

Respondent respectfully maintains

that Petitioners have not demonstrated that this Court has jurisdiction to consider this case, much less issue a Writ of Certiorari. This is so because Petitioners have not alleged any constitutional, statutory, or court rule basis for invocation of this Court's jurisdiction. Petitioners have not demonstrated that the Florida state courts have denied any United States Constitutional assertions raised by Petitioners. Further, Petitioners have not demonstrated that the issues presented to this Court in their present application for Writ of Certiorari have ever been presented to the Florida state courts.

Should this Court choose to examine the alleged improper prosecutor closing arguments that Petitioners present as grounds for relief in this Court, it is abundantly clear that Petitioners have not met their burden in establishing that these particular comments, in the context of the state trial court record, constitute a violation of their Sixth and Fourteenth Amendment rights. Petitioners merely assert that the comments, per se, constitute a violation of their constitutional rights. Petitioners have not demonstrated prejudice by the particular comments because the jury may have been swayed by them where there was a close question of evidence of guilt in their case. Petitioners have not established that, as it appears from the very nature of the comments, that the particular comments were not responsive to the conduct and closing arguments of Petitioners' own privately retained trial counsel.

Finally, Petitioners have not established that there was any potential prejudice resulting from the alleged improper comments or that it was not cured by the instructions given by the trial judge concerning the weight the jury was to give as to closing argument of counsel.

Based upon the foregoing, supported by the authorities cited in the argument portion of this brief, Respondent respectfully requests that this Court decline to assume jurisdiction in this case and deny Petitioners' application for issuance of a Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to a Petition for Writ of Certiorari to the Supreme Court of the State of Florida has been forwarded by mail this 14th day of August, 1974, to Honorable Larry Klein, CONE, WAGNER, NUGENT, JOHNSON & McKEOWN, P.A., 507 North Olive Avenue, West Palm Beach, Florida 33402, Attorneys for Petitioners.

BASIL S. DIAMOND
Assistant Attorney General

RESPONDENT'S APPENDIX

Ladies and Gentlemen of the jury, counsel at this stage of the trial will be making their final arguments to you. Counsel in making these arguments to you will be commenting upon the testimony and evidence that you have heard and that has been presented to you in this case.

They, as you, will be recalling the evidence in the case. They will not intentionally try to mislead you, however, if their recollection of the evidence differs from what your recollection is, you must follow your own recollection.

These final arguments by counsel are not to be construed by you as evidence in the case nor instructions on the law. Nevertheless, these arguments are intended to help you understand the contentions of each side and you should give them your close attention.

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge not guilty of Count One, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus William George Broge; Verdict: We, the jury, find the defendant William George Broge, guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Four of the Information, so say we all. Dated July 22, 1971, West

Palm Beach, Florida Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, State of Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant Jim Trent not guilty of Count One, so say we all. Dated July 7, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

THE COURT: What was that date?

THE CLERK: July 22, 1971, Your Honor.

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant, Jim Trent, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant, Jim Trent, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record

in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Jim Trent; Verdict: We, the jury, find the defendant Jim Trent guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Fourt of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Harold Gordon McDade; Verdict: We, the jury, find the defendant, Harold Gordon McDade not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Harold Gordon McDade; Verdict: We, the jury, find the defendant, Harold Gordon McDade not guilty of Count Three, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, State of Florida, Case Number 70C-2046, State of Florida versus Azell Johnson; Verdict: We, the jury, find the defendant, Azell Johnson not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case

Number 70C-2046, State of Florida versus Azell Johnson; Verdict: We, the jury, find the defendant, Azell Johnson, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Robert Beaureguard; Verdict: We, the jury, find the defendant, Robert Beaureguard not guilty of Count Three, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant, Richard Arthur Trout not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant Richard Arthur Trout guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record

in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Arthur Trout; Verdict: We, the jury, find the defendant, Richard Arthur Trout not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant Eugene Mobley guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant Eugene Mobley, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Eugene Mobley; Verdict: We, the jury, find the defendant, Eugene Mobley, guilty of Riot by Destruction of Building While Unlawfully Assembled as charged in Count Four of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Samuel E. Glizk; Verdict: We, the jury, find the defendant, Samuel E. Glizk, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Samuel E. Glizk; Verdict: We, the jury, find the defendant, Samuel E. Glizk, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Preston LeGay Boyce; Verdict: We, the jury, find the defendant, Preston LeGay Boyce, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Allen; Verdict: We, the jury, find the defendant, Richard Allen, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Richard Allen; Verdict: We, the jury, find the defendant, Richard Allen, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Freddie Jones Walden; Verdict: We, the jury, find the defendant, Freddie Jones Walden, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant Biagio John Ferrara, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant Biagio John Ferrara, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir,

Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Biagio John Ferrara; Verdict: We, the jury, find the defendant, Biagio John Ferrara, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant Bartholomew O'Shea, guilty of Riot as charged in Count Two of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant, Bartholomew O'Shea, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Bartholomew O'Shea; Verdict: We, the jury, find the defendant, Bartholomew O'Shea, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes; Verdict: We, the jury, find the defendant Lanny Stokes, not guilty of Count Two, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes; Verdict: We, the jury, find the defendant, Lanny Stokes, guilty of Unlawful Assembly as charged in Count Three of the Information, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."

"In the Criminal Court of Record in and for Palm Beach County, Florida, Case Number 70C-2046, State of Florida versus Lanny Stokes, Verdict: We, the jury, find the defendant, Lanny Stokes, not guilty of Count Four, so say we all. Dated July 22, 1971, West Palm Beach, Florida. Robert R. Weir, Foreman."